

POLICY PERSPECTIVES

VHA Revises Policy on Informed Consent

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Most of us take the idea of informed consent for granted. When we go to the hospital or outpatient clinic, we expect that our doctor will explain her reasons for recommending a particular treatment or procedure, describe the benefits, risks, and alternatives so that we (the patient) can make an informed choice. The doctrine of informed consent combines principles of law and ethics. It imposes a duty on the physician to provide information that will enable the patient to make a voluntary choice and acknowledges that the patient has the right to accept or refuse any recommended treatment or procedure, even when refusal of treatment could result in serious injury or death.

The doctrine of informed consent evolved in the courts. It began with civil prosecutions for battery or unlawful touching and culminated with cases, such as *Cruzan*,¹ that gave legal precedence to the concepts of patient autonomy and self-determination. For patients receiving care in VHA facilities, the requirement for informed consent is prescribed by federal statute, 38 U.S.C. § 7331. This law requires the Secretary, with the advice of the Under Secretary for Health, to establish procedures to ensure that to the maximum extent practicable, all patient care furnished by VA shall be carried out only with the full and informed consent of the patient or, in appropriate cases, a representative. VA policy and procedures on informed consent are found in 38 C.F.R. §17.32 and the corresponding VHA Handbook, 1004.1, *Informed Consent for Clinical Treatments and Procedures*.²

This national policy, which establishes a process for informing patients about their health care options and obtaining their consent prior to treatment, was recently updated. The new version of the handbook published in January 2003, clarifies a number of key areas and describes in greater detail the responsibilities of different individuals involved in the informed consent process.

The new handbook makes clear that the practitioner who will perform the treatment or procedure is ultimately responsible for assessing the patient's decision-making capacity and ensuring that the informed consent process outlined in the policy is followed. This includes completing the documentation in the medical record and when appropriate, obtaining the patient's or surrogate's signature on an authorized VA consent form.

The revised policy also requires that each facility have a procedure in place for identifying surrogates. This may include examining personal effects, medical records, and other VA records such as benefits and pension records. Under VHA

policy, the priority order of surrogates is: first, health care agent (i.e., the person named in a durable power of attorney for health care), then legal guardian, next-of-kin, and close friend. Next-of-kin is defined as spouse, child, parent, sibling, grandparent, and grandchild, in that order.

When possible it is best to identify potential surrogates before the patient loses decision-making capacity. If a surrogate is identified, an attempt to contact that person by telephone must be made within 24 hours of a determination that the patient lacks decision-making capacity. If the patient is not expected to regain decision-making capacity within a reasonable period of time and the a treatment or procedure is medically indicated then the practitioner who will perform the treatment or procedure must get informed consent from the patient's authorized surrogate. The same process for obtaining and documenting the informed consent discussion with the patient also applies when informed consent is obtained from the surrogate.

The new policy also explicitly addresses the issue of disagreements among surrogates of the same priority, e.g., adult children, who disagree about a particular health care decision. This circumstance can commonly occur in the health care setting. The revised handbook requires that the practitioner make reasonable efforts to encourage consensus. However, should such efforts fail, the practitioner must choose the surrogate best able to speak for the patient and document the reasons for that decision in the medical record.

Another important area carefully detailed in the revised handbook is the basis for surrogate decision making. When the surrogate has specific knowledge of the patient's values and wishes pertaining to health care choices, the surrogate's decision must be based on what the patient would choose if able to speak for herself, i.e., *substituted judgment*. That choice may not coincide with what the surrogate or health care team otherwise believes would be optimal for the patient. When the surrogate does not have specific information about the patient's wishes, the *best interest* standard applies. In this circumstance the surrogate together with the health care team determine what would be best for the patient, taking into account what they do know about the patient's status and health care goals, including the patient's cultural, ethnic, and religious perspectives.

Informed consent is more than getting the patient or surrogate to sign a form. It's the process of informing patients about their health care options and documenting these encounters in the medical record. All VHA practitioners have a role in the informed consent process. Through this process we promote high quality health care for veterans by ensuring improved communication between patients and providers and complete and timely documentation in the medical record.

References:

1. In *Cruzan*, the U.S. Supreme Court confirmed that the doctrine of informed consent includes the right to refuse treatment. The Court further held, however, that legitimate state interests in preserving life support state requirements, such as Missouri's, that there be *clear and convincing* evidence of the patient's wish to refuse life-sustaining treatment. See *Cruzan v. Director, Missouri Department of Health, et al.* 497 U.S. 261; 110 S.Ct. 2841; 111 L.Ed. 2d 224 (1990).
2. VHA Handbook 1004.1 *Informed Consent for Clinical Treatments and Procedures*. Available at: <http://www.va.gov/vhaethics/download/ICPolicy.DOC>.